

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT C. O'HARVEY and DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, Spokane, WA

*Docket No. 00-617; Submitted on the Record;  
Issued December 28, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

The Board has reviewed the case record and finds that the Office abused its discretion in refusing to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

On January 7, 1989 appellant, then a 37-year-old agent, filed a traumatic injury claim alleging that on December 29, 1988 he injured his shoulder, neck and back while in the performance of duty. Appellant sustained his injuries as a result of a motor vehicle accident.

The Office accepted appellant's claim for cervical, thoracic and lumbar subluxations and somatoform pain disorder.

In a notice of proposed termination of compensation dated June 8, 1994, the Office advised appellant that it proposed to terminate his compensation based on the reports of Dr. Warren J. Adams, a Board-certified orthopedic surgeon and an impartial medical examiner, finding that appellant no longer had any disability due to his December 29, 1988 employment injury. The Office also advised appellant to submit additional medical evidence supportive of his continued disability within 30 days.

By decision dated December 14, 1994, the Office terminated appellant's compensation effective December 15, 1994 based on Dr. Adams' reports. In a January 3, 1995 letter, appellant requested a review of the written record by an Office representative.

In a March 17, 1995 decision, the hearing representative affirmed the Office's decision. Appellant requested reconsideration of the hearing representative's decision in a letter dated July 7, 1995.

By decision dated October 18, 1995, the Office denied appellant's request for modification based on a merit review of the claim. In a November 6, 1995 letter, appellant requested reconsideration of the hearing representative's March 17, 1995 decision.<sup>1</sup>

In a decision dated May 22, 1998, the Office denied appellant's request for modification based on a merit review of the claim. In a May 10, 1999 letter, appellant requested reconsideration of the Office's decision.

By decision dated July 20, 1999, the Office denied appellant's request for a merit review of his claim.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>2</sup> As appellant filed his request for an appeal on October 21, 1999, the only decision before the Board is the July 20, 1999 decision denying appellant's request for a review of the merits of his claim.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>3</sup> the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.<sup>4</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>5</sup> When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.<sup>6</sup>

In his May 10, 1999 request for reconsideration, appellant argued that the Office failed to meet its burden of proof in terminating his compensation. Appellant also argued that the Office failed to consider his claim as presented by him. Further, appellant argued that the Office failed to resolve the conflict in the medical opinion evidence. As the Office previously considered

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<sup>1</sup> Subsequent to his November 6, 1995 request for reconsideration of the hearing representative's March 17, 1995 decision, appellant appealed this decision to the Board on March 15, 1996. By decision dated August 30, 1996, the Board granted the Office's petition to dismiss appellant's appeal on the grounds that the Board and the Office could not exercise concurrent jurisdiction over the same issue, and that the Office agreed to review the merits of appellant's claim on reconsideration.

<sup>2</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

<sup>3</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.606(b)(1)-(2).

<sup>5</sup> *Id.* at § 10.607(a).

<sup>6</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

these arguments, they are duplicative and repetitive in nature, and therefore, insufficient to warrant a merit review of the case.<sup>7</sup>

Appellant argued that the Office's May 22, 1998 decision should be set aside because the senior claims examiner, Collette M. Bullis, had previously been substantially involved in his case, and thus, was barred from conducting a merit review pursuant to the Office's procedure manual. The Board finds that appellant has failed to articulate a legal argument with a reasonable color of validity.

The Office's procedure manual provides:

"Each request for reconsideration must be handled by a Senior Claims Examiner (SrCE) who was not involved in making the contested decision.... All reconsideration decisions, whether affirmative or negative, must bear the signature of the SrCE or higher authority."<sup>8</sup>

In his November 6, 1995 letter, appellant requested reconsideration of the March 17, 1995 decision of hearing representative Richard Koretz. In response, Ms. Bullis denied appellant's request for modification of the March 17, 1995 decision in a May 22, 1998 decision. As Ms. Bullis was not involved in the contested decision dated March 17, 1995, appellant's argument is insufficient to warrant a review of the merits of his case.<sup>9</sup>

Appellant submitted a January 8, 1991 deposition transcript of John T. Lloyd, a licensed psychologist and his treating physician, revealing that his employment-related pain disabled him from work. Because Dr. Lloyd's deposition testimony is duplicative of that already in the case record, it is insufficient to warrant a merit review of the case.<sup>10</sup>

The October 2, 1996 report of Dr. David D. Bot, a Board-certified psychiatrist and Office physician, revealing that appellant's pain disorder was causally related to his December 29, 1988 employment injury is similar to a previously submitted January 2, 1990 report of Dr. Bot, which had been considered by the Office. Thus, Dr. Bot's October 2, 1996 report is repetitive in nature and insufficient to warrant a merit review of the case.<sup>11</sup>

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<sup>7</sup> *James A. England*, 47 ECAB 115 (1995).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.11602.2(b) (May 1996).

<sup>9</sup> The Board notes that the record merely reveals that Ms. Bullis prepared a statement of accepted facts, a list of questions regarding appellant's medical condition, and letters to physicians regarding appellant's condition, to appellant regarding his compensation and to the employing establishment.

<sup>10</sup> *James A. England*, *supra* note 7.

<sup>11</sup> *Id.*

In a June 21, 1995 report, Dr. Jonathan L. Ritson, a Board-certified physiatrist, diagnosed the following:

“Somatoform pain disorder related to [appellant’s] motor vehicle accident of December 29, 1988 with components of slight paranoia, narcissistic behaviors, family troubles, highly somatic[al]ly focused and vocational disruption.”

Dr. Ritson concluded:

“Given the severity of [appellant’s] somatoform pain disorder though he is clearly unable to carry out the tasks of his previous employment.”

Hence, Dr. Ritson’s report constitutes relevant and pertinent new evidence not previously considered by the Office such that review of the evidence and the case on its merits is warranted as to whether appellant has any continuing disability causally related to his December 29, 1988 employment injury. Therefore, the Board finds that the Office abused its discretion by denying appellant’s request for a review of the merits of his claim under section 8128(a) of the Act.

The July 20, 1999 decision of the Office of Workers’ Compensation Programs is hereby set aside and the case is remanded for further consideration on its merits.

Dated, Washington, DC  
December 28, 2001

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Member